SAIDI YAACOB

v.

IBRAHIM AWANG & ANOR.

HIGH COURT MALAYA, KOTA BHARU
EUSOFF CHIN J
[CIVIL APPEAL NO. 2 OF 1982]
29 JANUARY 1983

TORT: *Negligence - Accident - Standard of conduct - Reasonable foreseeability - Contributory negligence - Duty to take reasonable care of oneself.*

The 1st respondent, the servant or agent of the 2nd respondent, was driving a motor lorry to Kota Bharu and was towing another motor lorry when both lorries stopped at a roundabout. The towing chain relaxed and sagged. The appellant walked across the road and stepped over the chain when the front lorry moved forward, causing the chain to become taut and the appellant to fall. The rear lorry went over the appellant's arm. The appellant was 18 years old at the time of the accident. No warning had been given to him by either of the lorry drivers. However, the appellant had been warned not to cross by a trishaw rider. The Magistrate dismissed the appellant's claim. The appellant appealed.

Held:

[1] In the circumstances of the case, the 1st respondent ought to have or known to have foreseen that people might try to cross the road between the two lorries whenever the lorries stopped on the road.

[2] The respondents had to prove that in all circumstances which they knew or ought to have known, they had taken all the proper steps or reasonable precautions to avoid such danger, but this they had failed to do. A prudent man will guard against the possible negligence of others when experience shows such negligence to be common. (*London Passenger Transport Board v. Upson & Anor.* [1949] AC 155; *Berrill v. Road Haulage Executive* [1952] Lloyd's (Rep) 490, 492; *Grant v. Sun Shipping Company Limited* [1948] AC 549, 567; *Hay or Bournill v. Young* [1943] AC 92, 107).

[3] The appellant was himself negligent and was 50% to blame for the accident. The real question is not whether the plaintiff was neglecting some legal duty, but whether he was acting as a responsible man and with reasonable care. (*Davies v. Swan Motor Co. (Swansea) Ltd.* [1949] 1 AER 620, 631).

[Appeal allowed. Case remitted for determination of quantum of damages.]

Cases referred to:

London Passenger Transport Board v. Upson & Anor. [1949] AC 155
Berrill v. Road Haulage Executive [1952] Lloyd's Rep 490
Grant v. Sun Shipping Company Limited [1948] AC 549
Hay or Bournill v. Young [1943] AC 92
Davies v. Swan Motor Co., (Swansea), Ltd., [1949] 1 AER 620

For the appellant - M/s. C. Jegathesan & Co.
For the respondents - M/s. Wrigglesworth & Co.

JUDGMENT

Eusoff Chin J:

This case came before me on appeal from the decision of the Magistrate, Kota Bharu.

The notes of evidence recorded by Magistrate shows that on 18 May 1974 at about 9.30 a.m. the first respondent, Ibrahim bin Awang, was driving motor lorry No. MC6319 along Jalan Sultan Ibrahim to go to Kota Bharu town. This lorry was, by using a chain, towing another motor lorry No. BU9197. There is no evidence as to who was driving the towed lorry. Both lorries stopped on the road before entering the Rex roundabout in front of the old Post Office. When both lorries stopped the towing chain relaxed and sagged to a knee height. The appellant walked across the road from the right side of the lorries, stepped over the chain between the front lorry and the rear lorry. At that time the front lorry moved forward and the chain, on becoming taut, caused the appellant to fall down and the rear lorry went over the appellant's left arm. The Magistrate found that the respondents were not at fault and dismissed the appellant's claim.

In this case the Statement of Defence admits that the first respondent was the servant or agent of the second respondent.

The appellant said in the evidence that he did not think it was a big risk to cross the road by crossing between the two lorries. He was then 18 years old. There is no evidence as to the width of the rear lorry to indicate the distance the appellant had to walk to get clear of the rear lorry. The sketch plan in Bundle of Documents does not indicate the width of the two lorries. The appellant knew that the lorries might move at any time. But he had said in the evidence that the front driver had seen him in the rear view mirror which was on the right of the driver when the appellant was beside the lorry before he proceeded to cross that portion of the road between the two lorries. He also gave evidence that he did not ask permission of the driver of the rear lorry, and that the driver of the rear lorry never stopped him from crossing. The appellant said he heard a voice warning him not to cross, and that voice came from a trishaw rider Pa'Tah who was called and identified by appellant in Court.

The defence had called only the first respondent to give evidence. The first respondent was driving the front lorry MC6319, as alleged in para. 1 in the statement of claim had admitted by the defence in their statement of defence. There is no evidence adduced by the defence as to why the rear lorry was on tow. Is it because the lorry had no engine or is it because of some other mechanical or engine trouble, and in any event whether or not the horn was functioning? There was no evidence as to what precautions the respondents had taken to ensure that the towing of the lorry would not be a source of danger to public. There was no evidence as to what arrangements were made between the front lorry driver and the towed lorry driver, (e.g., rear driver to sound the horn twice) to stop the front lorry from moving so as to prevent accident happening in case any child or person is foolish enough to take the risk by crossing the road between the two lorries as the appellant had done when the lorries at any time came to a stand still on the road. The second respondent, the driver of the towed lorry was not called to give evidence. There is no evidence that the rear lorry driver had warned the appellant not to cross in front of his lorry or had taken any step to warn the front lorry driver not to move ahead, or whether the towed lorry driver had applied the brakes or taken any reasonable step to avoid the accident, bearing in mind the fact that the appellant was crossing the road directly in front of the rear lorry, and therefore in full view of the towed lorry driver.

No cases had been cited or referred to by both counsels in the Magistrate's Court or when they were making their submissions before me. Under the circumstances, I have to examine who is to be liable for the accident.

Lord Uthwatt in *London Passenger Transport Board v. Upson & Anor*. [1949] AC 155, p. 173, said:

> A driver is not, of course, bound to anticipate folly in all its forms, but he is not, in my opinion, entitled to put out of consideration the teaching of experience as to the form those follies commonly take.

Slade J paraphrasing Lord Uthwatt's statement, in *Berrill v. Road Haulage Executive* [1952] Lloyd's 490, p. 492 said:

> You are not bound to foresee every extremity of folly which occurs on the road. Equally, you are certainly not entitled to drive upon the footing that other users of the road either drivers or pedestrians, will exercise reasonable care. You are bound to anticipate any act which is reasonably foreseeable, that is to say, anything which the experience of road users teaches them that people do, albeit negligently.

Lord du Parcq when dealing with standard of conduct of ordinary or an ordinary prudent man in *Grant v. Sun Shipping Company Limited*, [1948] AC 549, p. 567, said:

> I am far from saying that everyone is entitled to assume in all circumstances that other persons will be careful. On the contrary, a prudent man will guard against the possible negligence of others when experience shows such negligence to be common.

In *Hay or Bournill v. Young* [1943] AC 92, p. 107, Lord Wright said:

> This general concept of reasonable foresight as the criterion of negligence or breach of duty (strict or otherwise) may be criticized as too vague, but negligence is a fluid principle, which has to be applied to the most diverse conditions and problems of human life. It is a concrete, not an abstract idea. It has to be fitted to the facts of the particular case.

In the appeal before me, I find that the respondent ought to know, or to foresee, that in the circumstances a person might try to cross the road between the two lorries whenever the lorries stopped on the road. The respondents had to prove that in all circumstances which they knew or ought to have known, they have taken all the proper steps or reasonable precautions to avoid such danger. In this case I find they have failed to do that. There is no evidence that the driver of the towed lorry had done anything to stop the lorry by application of the brakes, and I believe his lorry's brakes were effective or else at every stop he would have knocked into the front lorry. There is no evidence that he had taken any step to warn the appellant not to cross the road as the appellant was about to do so, or to warn the driver of the front lorry not to move forward by sounding the horn. The warning shout to the appellant came from the trishaw rider. On the other hand the appellant said he knew the lorry was on tow but he had taken the risk by taking the short cut instead of crossing the road behind the towed lorry. He said under cross examination, "I did not realise the danger when I crossed the tow chain. I was still young at that time."

Lord Denning in *Davies v. Swan Motor Co. (Swansea), Ltd.* [1949] 1 AER 620, p. 631 stated that:

> When a man steps into the road he owes a duty to himself to take care for his own safety, but he does not owe to a motorist who is going at an excessive speed any duty to avoid being run down. Nevertheless, if he does not keep a good lookout, he is guilty of contributory negligence. The real question is not whether the plaintiff was neglecting some legal duty, but whether he was acting as a responsible man and with reasonable care.

There is no evidence as to the distance between the front lorry and the towed lorry at the time of appellant's attempting to cross that stretch of road between the lorries. But the sketch plan drawn after the accident indicated that the distances between the front and the back lorry was 8 feet 6 inches. This is wide enough to tempt pedestrians to pass through and the respondents ought to have known or to have foreseen that a pedestrian might do just that. Therefore, the towing and the towed lorry drivers should have made some arrangements between themselves so that in the event of just such a thing happening the towed lorry driver would give some form of warning to the driver of the front lorry not to proceed. The respondents, have, therefore, been negligent in not having taken proper precaution to prevent such accident happening. On the other hand, the appellant was himself negligent in taking on himself the hazard of crossing the few feet of road between the two lorries, although he did so directly in front and in the full view of the towed lorry driver. Notwithstanding that he was then 18 years old, I find that he is 50% to blame for the accident.

The Magistrate in his grounds of judgment had said,

> The driver of the towed lorry was totally powerless at this instance because, he himself was under the power of the towing lorry driver. For that reason whatever happen in front of him he was absolutely powerless because he was just a steering controller of the towed lorry.

But as I have said earlier, the driver of the towed lorry had not been called-to give evidence, and it would be wrong to assume that the driver of the towed lorry was powerless to do anything such as applying the lorry brakes and at the same time sounding his horn or shouting warning to the front lorry driver not to move ahead.

I therefore allow the appeal and remit the case to the Magistrate to determine the quantum of damages.

Also found at [1983] 2 CLJ 143